No. 17389

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEPHEN R. BENCHWICK,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the
United States for the District of Hawaii

BRIEF FOR APPELLANT

FILED

JUL 4 [illegible]

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BRIEF FOR APPELLANT

JURISDICTION

The District Court had jurisdiction at the trial of this case under 18 U.S.C. § 3231 and Rule 18, Federal Rules of Criminal Procedure. After conviction, jury waived, a timely appeal was taken, and the jurisdiction of this Court to review the judgment of the District Court is invoked under 28 U.S.C. §§ 1291 and 1294.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible],

[illegible]

vs.

[illegible],

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

STATEMENT OF THE CASE

On January 27, 1961, after the execution and filing of a Waiver of Indictment (R-2) by the Appellant, an Information containing 13 counts was filed against Appellant in the United States District Court for the District of Hawaii under 18 U.S.C. §§ 2 and 656 charging him with knowingly, wilfully and feloniously, and with intent to injure and defraud an insured bank, aiding, abetting, counselling, inducing and procuring William Moss Vannatta, an officer, agent and employee of said insured bank, namely, Manager, Aiea Branch, Bank of Hawaii, Aiea, Oahu, in the District of Hawaii, to, and the said Vannatta did, then and there wilfully misapply, for the use and benefit of the Appellant, certain of the moneys, funds and credits of said insured bank, said Vannatta having the intent to defraud and to injure said bank, in that the Appellant did draw and issue certain checks against his account at said branch payable to Dean Witter & Company, the Appellant and said Vannatta knowing at the time thereof that there were insufficient funds in the Appellant's said account with which to honor and pay said checks, but which said checks were honored and paid by said Vannatta with moneys, funds and credits of said insured bank, and which said checks said Vannatta did not then and there charge against the Appellant's said account, but instead wilfully charged to and placed in the Deferred Items Account maintained at said branch, which

said checks were held by said Vannatta in said Deferred Items Account during certain periods of time, during which periods said moneys, funds and credits of said insured bank had been used by said Vannatta to so honor and pay said checks, without the receipt, during said periods, of any equivalent moneys, funds and credits by said insured bank to replace its own moneys, funds and credits so paid out, all as well known, intended, aided, abetted, counselled, induced and procured by the Appellant, as follows (R 4-17):

Count	Date	Amount of Check	Period in Deferred Items Account
I	July 30, 1959	$ 9,200.00	July 30 - Aug. 11, 1959
II	Aug. 12, 1959	4,150.00	Aug. 12 - Aug. 20, 1959
III	Aug. 26, 1959	2,500.00	Aug. 26 - Aug. 28, 1959
IV	Sept. 2, 1959	6,202.50	Sept. 2 - Sept. 29, 1959
V	Sept. 23, 1959	19,525.00	Sept. 23 - Sept. 29, 1959
VI	Oct. 6, 1959	39,450.00	Oct. 6 - Oct. 27, 1959
VII	Oct. 15, 1959	8,200.00	Oct. 15 - Nov. 2, 1959
VIII	Oct. 23, 1959	16,100.00	Oct. 23 - Oct. 30, 1959
IX	Nov. 5, 1959	60,325.00	Nov. 5 - Nov. 28, 1959
X	Nov. 10, 1959	12,475.00	Nov. 10 - Nov. 28, 1959
XI	Nov. 28, 1959	5,600.00	Nov. 28 - Dec. 31, 1959
XII	Dec. 9, 1959	70,400.00	Dec. 9 - Dec. 31, 1959
XIII	Dec. 21, 1959	6,850.00	Dec. 21 - Dec. 31, 1959

On the same day (January 27, 1961) Appellant was arraigned, filed a Motion for Appropriate Relief (To Compel the Prosecution to Elect) (R-19), entered a plea of not guilty to each

count of the Information, and a Waiver of Trial by Jury was signed and filed (R-20). The case was tried, jury waived, before the Honorable George H. Boldt, United States District Judge, on January 30 and 31 and February 2, 1961.

Appellant moved for judgment of acquittal on the ground of insufficiency of the evidence at the close of the government's case, submitting a Request for Special Findings of Fact under Rule 23(c) of the Federal Rules of Criminal Procedure; the motion was summarily denied without the entry of any findings (R-245). Appellant again moved for a judgment of acquittal after all of the evidence was in which motion was again summarily denied (R-384). The Court then orally reviewed the evidence (R-384 - 389), answered the request for special findings of each in the affirmative (R-389) and found the Appellant guilty on all 13 counts of the Information (R-390).

During the course of the trial, certain testimony and exhibits were offered and accepted over objection of the Appellant pertaining to events which occurred subsequent to the period covered by the Information.

Appellant was adjudged guilty and sentenced by the Court to imprisonment and the imposition of a fine on February 10, 1961 (R-31). Notice of Appeal was filed on the next day, February 11, 1961 (R-32).

SPECIFICATION OF ERRORS

1. In ruling on the motion for judgment of acquittal after the close of the government's evidence the District Court erred in failing to weigh the evidence and enter special findings of fact setting forth whether, absent a defense, it would find the defendant guilty as to any of the counts of the Information.

2. The District Court erred in failing to grant Appellant's motion for judgment of acquittal:

   a. After the close of the government's evidence

   b. After all the evidence was closed.

3. The District Court erred in considering evidence of events subsequent to the period of the offenses alleged in the Information in determining the Appellant's guilt.

ARGUMENT

Summary

The principal argument relates to the insufficiency of the evidence to sustain the conviction of the Appellant herein on the offenses charged under 18 U.S.C. §§ 2 and 656. This is set forth under Specification of Error No. 2, the failure of the District Court to grant Appellant's motions for judgment of acquittal. It is contended that there is no evidence which could sustain a finding that the Appellant, a bank depositor who wrote checks with insufficient funds, knew that

the bank manager was wilfully concealing those checks contrary to bank regulations or making false entries in order to misapply moneys of the bank for Appellant's use with intent to injure or defraud the bank, or that Appellant knowingly collaborated or associated with the manager in those acts and with intent to injure or defraud the bank.

There are two collateral questions presented in Specifications of Error Nos. 1 and 3. It is contended that in a jury waived trial before denying a motion for judgment of acquittal after the close of the prosecution's evidence, the judge should weigh the evidence and determine whether he would find the defendant guilty if no further evidence were produced.

It is also argued that the Court below considered and was unduly influenced by inadmissible and prejudicial evidence of events which occurred subsequent to the period of the offenses alleged in the Information. This accounts for the finding of guilt in the absence of any evidence sufficient to sustain such a conviction.

Under the circumstances a judgment of acquittal of the Appellant should be ordered.

SPECIFICATION OF ERROR NO. 1

IN RULING ON THE MOTION FOR JUDGMENT OF ACQUITTAL AFTER THE CLOSE OF THE GOVERNMENT'S EVIDENCE THE DISTRICT COURT ERRED IN FAILING TO WEIGH THE EVIDENCE AND ENTER SPECIAL FINDINGS OF FACT SETTING FORTH WHETHER ABSENT A DEFENSE, IT WOULD FIND THE DEFENDANT GUILTY AS TO ANY OF THE COUNTS OF THE INFORMATION.

In ruling on a motion for judgment of acquittal under Rule 29(a), Federal Rules of Criminal Procedure, U.S.C.A., it is the duty of the trial court to weigh the evidence and the credibility of the witnesses. U.S. v. Empire Packing Company, 7 Cir. 1949, 174 F.2d 216 cert. den. 337 U.S. 959, 93 L. Ed. 1758. Moreover,

> "Where the court is the trier of fact, the test to be applied to the evidence produced by the government is not whether it could sustain a conviction, but whether the government has so far substantiated its case that absent a defense the court would find the defendant guilty as to any of the counts of the indictment."
>
> "A contrary rule, . . . would put upon the defendant the risk that by his own evidence, as by testimony produced on cross-examination, he might supply the evidence which convinces the trier of fact of his guilt, where absent such evidence the trier of fact would not be so convinced. To subject the defendant in a criminal case to such a risk would be contrary to the principles by which the criminal law has developed in this country. It would in effect require the defendant to assist in providing a vital element of the evidence which convicts him.
>
> "The question before this court upon this motion, therefore, is not whether the evidence is substantial enough to warrant submission of the case to a jury, but whether the government has met its full burden of proof, that of showing beyond a reasonable doubt the guilt of the accused."

U.S. v. Camp, D.C. Haw. 1956, 140 F. Supp. 98, 99
c.f.: U.S. v. Cascade Linen Supply Corporation, D.C.S.D.N.Y. 1958, 160 F. Supp. 565
U.S. v. Maryland & Virginia Milk Products Association, D.C.D.C. 1950, 90 F. Supp. 681

There is no reason why the defendant in a criminal case should not be entitled to the same consideration as the defendant in a civil case tried to the court upon a motion to dismiss after the plaintiff has completed the presentation of its evidence under Rule 41(b), Federal Rules of Civil Procedure, 1946 Amendment, U.S.C.A., Vol. 5 Moore's Federal Practice, Par. 41.13 [4], pp 1044 - 1046. And this was considered the better practice as adopted by this and some other circuits prior to the 1946 amendment. Barr v. Equitable Life Assurance Society, 9 Cir. 1945, 149 F.2d 637. Since no specific provision in the Civil Rules was considered necessary to the adoption of such a practice it seems that the same should be true with respect to the Criminal Rules.

As Judge Murphy intimated in Camp, supra, a contrary rule would be tantamount to an abridgement of the defendant's rights under the Fifth Amendment to the Constitution of the United States, U.S.C.A.

Of course in that case the judge granted the motion and thus no procedural problems were involved. But where as here, the judge denies the motion, the question arises at this stage as to just what mental process he went through in so doing. In a jury waived trial the record is often devoid of anything from which the appellate court can determine the legal principles applied by the trial judge to the evidence. Occasionally resort is made to statements

made by the judge during argument. Wilson v. U.S., 9 Cir. 1958, 250 F.2d 312, 322 - 324. But this is the function of the request for special findings under Rule 23(c), Federal Rules of Criminal Procedure U.S.C.A. In this instance such a request for special findings was submitted to the trial judge at the time the motion was made (R-245, 23-25), but the motion was summarily denied without the entry of any such findings (R-245). Thus there is no way this Court can ascertain the standard of law which was applied. (Although it does not appear in the record the argument made on the motion urged the application of the principle of Camp upon the trial judge. However, as above stated there is nothing in the record or otherwise which would indicate that he adopted it.)

In the absence of any reasons given for the denial of the motion we cannot indulge in the presumption that the trial judge properly applied the law when he failed to make requested special findings at this stage of the trial. And a conviction cannot be sustained where it is likely that the judge applied the wrong standard of law in analyzing the evidence. Wilson, supra, 250 F.2d p. 312.

SPECIFICATION OF ERROR NO. 2

THE DISTRICT COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL:

A. AFTER THE CLOSE OF THE GOVERNMENT'S EVIDENCE

B. AFTER ALL THE EVIDENCE WAS CLOSED.

Appellant moved for a judgment of acquittal both at the close of the government's evidence (R-245) and after all the evidence was in (R-384).

Although the trial court was required to weigh the evidence before it in each instance the general rule is that this court must review only the propriety of the denial of the latter motion. Gaunt v. U.S., 1 Cir. 1950, 184 F.2d 284, 290; cert. den. 340 U.S. 917, 95 L. Ed. 662. In other words the question here is whether there is sufficient evidence in the record as a whole to sustain the conviction. Appellant strongly contends there is not.

Of course the natural corollary to Appellant's argument on U.S. v. Camp, supra, 140 F. Supp. 98 would be to require this Court to analyze as well the government's evidence by itself in order to ascertain whether it alone would sustain a conviction. But none of the cases seem to so hold. In any event it is Appellant's position that the insufficiency of the evidence in the entire record is even more apparent than in the government's evidence alone. If we are correct in this view then of course Specification of Error No. 1 above becomes moot.

Briefly the undisputed facts show that the Appellant was an average businessman in the community who relied on

the manager of his bank, William Moss Vannatta in fiscal matters; that during 1959 he began to invest in the stock market with approximately $19,000 or more derived from savings and money borrowed from his bank on appropriate collateral and with Vannatta's approval; that he then began to trade in the market and on occasions would write checks for the purchase of stock in amounts which exceeded his bank balance (R-22); that in each instance Vannatta gave his approval, at first after the fact and later on even before the fact; that Vannatta's approval was conditioned on Appellant's assurance that he would cover the check with a deposit within a short time, and in any event by the end of the month, and this was generally accomplished with a check issued by Dean Witter & Co. for the sale of stocks out of Appellant's account (R-21, 22).

Before analyzing the evidence it would be well first to set forth extracts from the decided cases which define the elements of proof and the law applicable to the evidence necessary to convict under §§ 2 and 656 of 18 U.S.C.:

> "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a);
>
> "Whoever, being an officer, . . . agent or employee of . . . [an] insured bank, . . . wilfully misapplies any of the moneys, funds or credits of such bank . . . shall be [punished]." 18 U.S.C. § 656.

The wilful misapplication and the aiding or abetting

thereof must be "with intent to injure and defraud" the bank (R-4-17). See the paraphrasing of the Information in the Statement of the Case above (pp 2 and 3), and Seals v. U.S., 8 Cir. 1955, 221 F.2d 243, Logsdon v. U.S., 6 Cir. 1958, 253 F.2d 12, 14-15, U.S. v. Vannatta, D.C. Haw. 1960, 189 F. Supp. 937, U.S. v. Cawthon, D.C. Ga. 1954, 125 F. Supp. 419. As will be seen from the cases this is an offense which requires specific intent and in such respect is similar to the crime of Federal income tax evasion under § 7201 Internal Revenue Code of 1954, 26 U.S.C.A. That section has been interpreted as involving a particular degree of criminal intent (specific) which has been characterized by this Court as "wilful willfulness."

The case most analogous to this one involving offenses alleges under 18 U.S.C. §§ 2 and 656 is Logsdon v. U.S., supra. The following extracts from that and other pertinent decisions are hereinafter set forth as a frame of reference from which to analyze the (in-)sufficiency of the evidence in this case:

> "The most troublesome issue is raised by appellant's contention that the evidence was insufficient to take the case to the jury on the charge that he aided, abetted and induced the cashier to misapply the funds of the bank. We are not here dealing with the guilt of the cashier, which was adjudged through other proceedings. Since appellant was a depositor, but not an officer, director, agent or employee of the bank, he could not be guilty under Section 656, Title 18 U.S. Code, for misapplication of

the bank's funds. United States v. Tornabene, 3 Cir., 222 F.2d 875, 877. He was not so charged. Nor would he be guilty on account of the cashier's misapplication of funds unless he aided, abetted or induced the cashier to so act. Section 2(a), Title 18 U.S. Code. That is the offense charged. The absence of any showing of collaboration or association between the person charged and the principal prevents a conviction under that section. United States v. Moses, 3 Cir., 220 F.2d 166. . . . Overdrafts alone are not sufficient to show, in and of themselves, a violation of the statute. Seals v. United States, 8 Cir., 221 F.2d 243." 253 F.2d 14

"The *crucial issue* in the case would seem to be *whether appellant knew that the cashier was* paying his checks out of the bank's funds and *hiding the checks away*." (Emphasis added) 253 F.2d 15

"STEWART, Circuit Judge (dissenting)."

". . . *To convict*, the jury *had to find collaboration or association* between the appellant and the bank's cashier. United States v. Moses, supra." (Emphasis added)

"*It is not enough that the appellant may have wilfully created the occasion or the opportunity for the cashier's misapplication of the funds, even though the appellant may have foreseen these consequences of this own misconduct.*" (Emphasis added). "United States v. Peoni, 2 Cir., 1938, 100 F.2d 401, 402. Aiding and abetting 'involves much more than merely 'causing an act to be done.'' United States v. Chiarella, 2 Cir. 1950, 184 F.2d 903, 909.

"What prevents me from joining in affirmance of the judgment is the belief that the trial court's instructions were inadequate to apprise the jury of these principles. The jury were instructed that if the defendant issued checks knowing that they would be paid by the cashier, although both knew that there were insufficient funds in the defendant's accounts to cover the checks, then the defendant was guilty of aiding and abetting the cashier in violating the statute.[1]

> "The jury could thus have found the appellant guilty of aiding and abetting without finding the association, participation or collaboration in the criminal venture which, as the majority opinion points out, the law requires. Nye & Nissen v. United States, supra; see Morei v. United States, 6 Cir. 1942, 127 F.2d 827, 830-831." 253 F.2d 16

> "[1] The pertinent instructions were as follows: 'Now, upon the whole case and after considering all the evidence (sic) you are satisfied beyond a reasonable doubt that the defendants J. D. Logsdon and Regina Logsdon committed the acts charged in the indictment in that they aided, abetted, counseled and induced Bernard Ware Barrett to wilfully misapply moneys, funds and credits of the insured bank by issuing checks drawn on the bank in the sum specified in the indictment knowing that Barrett would honor and pay these checks from funds of the bank when both Barrett and these defendants knew that there were insufficient funds in the accounts against which the checks were drawn with which to pay them, if you believe that beyond a reasonable doubt, it's your duty to find the defendants guilty. If you do not so believe, it's your duty to acquit them.'"

The foregoing dissent was cited with approval recently by this Court in <u>Robinson v. U.S.</u>, 9 Cir. 1959, 262 F.2d 645, 651 where the appellant's conviction by the trial judge on a charge of aiding and abetting the sale of narcotics was reversed for lack of an adequate showing of collaboration. In that opinion this Court also quoted with approval the following from <u>Morei v. U.S.</u>, 6 Cir. 1942, 127 F.2d 827, 830:

> "'A person is not an accessory before the fact, unless there is some sort of active proceeding on his part; <u>he must incite, or procure, or encourage the criminal act, or assist or enable</u>

> *it to be done, or engage or counsel, or command the principal to do it.* Halsbury, supra § 531. Strictly speaking, in order to constitute one an accessory before the fact, there must exist a community of unlawful intention between him and the perpetrator of the crime. The concept of an accessory before the fact presupposes a prearrangement to do the act [cit.]; and to constitute one an aider and abettor, he must not only be on the ground, and by his presence aid, encourage, or incite the principal to commit the crime, but he must share the criminal intent or purpose of the principal.'"
> 262 F.2d 649

A bank depositor charged with aiding and abetting an employee of a member bank in misapplying moneys can, of course, be guilty only if the employee was guilty. *U.S. v. Klock*, 2 Cir. 1954, 210 F.2d 217. And as demonstrated above, the depositor must not only *know* that the employee is violating the law but also he must in some way collaborate in the *acts* which constitute the violation.

Quoting from *Seals v. U.S.*, 8 Cir. 1955, 221 F.2d 243:

> "The honoring of a check which creates an overdraft is not necessarily a violation of 18 U.S.C., Sec. 656. In reversing for excluding evidence bearing on intent, the court, in United States v. Klock, 2 Cir., 210 F.2d 217, 221, said:
>
> > '. . . In effect, the defense to the substantive counts of misapplication of funds was that the bank officials treated the overdrafts as loans. While perhaps making of loans in this manner may be in violation of some state law, nevertheless it does not constitute a crime under 12 U.S.C.A., Sec. 592 or 18 U.S.C., Sec. 656, if Klock had no notice of the impropriety. . .'"
> > 221 F.2d 243 * * * * *
>
> "In 7 Am. Jur., Banks, Sec. 609, p. 442, it is stated:
>
> > 'According to the general view, the payment of an overdraft by a bank amounts

> to a loan to the depositor; for that reason the amount thereof may be recovered from the depositor.'

"See also 9 C.J.S., Banks and Banking, Sec. 353 (b), page 703.

"From the foregoing, it is apparent that in order to convict in this case the Government must go further than to show that the cashing of the defendant's check resulted in an overdraft. It must in addition show that Seals had an intent to injure or defraud the bank, or to aid or abet Mrs. Simmington in so doing. The crucial question on this appeal is whether the record contains evidence which will support a finding that Seals intended to injure or defraud the bank. . . ." 221 F.2d 246

* * * * *

"There is no direct evidence as to Seals' financial responsibility, except that the evidence shows that he was able to and did produce the money to meet the check promptly upon demand. It is true that if a crime has been committed restitution does not wipe out the crime. However, financial responsibility and repayment are material considerations on the issue of intention to defraud. United States v. Wicoff, 7 Cir., 187 F.2d 886; United States v. Klock, supra; United States v. Matot, supra." 221 F.2d 249

And from Evans v. U.S., 153 U.S. 584, 592:

". . . The case is not unlike that of purchasing goods and obtaining credit. If a person buy goods on credit, in good faith, knowing that he is unable to pay for them at the time, but believing that he will be able to pay for them at the maturity of the bill, he is guilty of no offence, even if he be disappointed in making such payment. . . . In United States v. Britton, 108 U.S. 193, in which the charge was that the defendant, being president and director of the association, and, being insolvent, procured his own note to be discounted, the same not being well secured, the payee and the endorser thereof, being also insolvent, which he, defendant, well knew. The incriminating facts were that the note was not well secured, and that both the maker and endorser were, to the knowledge of the defendant, insolvent when the note was discounted. The question there presented was whether the procuring of the discount of such a note by an officer of the

> association was a wilful misapplication of its moneys within the meaning of the law. It was held that it was not. The criminality really depends upon the question whether there was, at the time of the discount, a deliberate purpose on the part of the defendant to defraud the bank of the amount."(Emphasis added)

And from U.S. v. Steinman, 3 Cir. 1909, 172 Fed. 913, 915:

> ". . . An overdraft of an account is not per se and necessarily an abstraction of the bank's funds under section 5209 by the drawer of a check who had not funds to meet it, nor is the payment of such overdraft check by an executive officer of the bank, without action by the Board, necessarily a misapplication under such section. Indeed, in Bolles on Modern Banking, page 199, it is said:
>
> > "'Generally, two kinds of overdrafts are as clearly justified as any other kind of a loan: (1) an unintentional overdraft by a depositor in good standing, and possessing ample means to pay; (2) an overdraft to be paid in pursuance of a prior agreement, resting on abundant credit.'"

The basic elements of proof necessary to convict the Appellant under this Information which were gleaned from the foregoing cases, are set forth in the Request for Special Findings of Fact (R-24, 25). Although the Court in finding the Appellant guilty on all counts answered each of said requested findings in the affirmative (R-389) the record is devoid of any evidence which would sustain such a finding as to requests 3, 4 and 5; i.e. that the Appellant knew that William Moss Vannatta wilfully concealed Appellant's checks contrary to bank regulations or made false entries in order to misapply moneys of the Bank for the use or benefit of the Appellant, with intent to injure or defraud

the Bank, and that Appellant knowingly collaborated or associated with Vannatta in those acts and with intent to injure or defraud the bank.

With respect to the checks set forth in the Information Mr. Vannatta testified on direct examination that each time one of them was received at the Bank he would call the Appellant and tell him to come in and cover it as soon as possible and that the Appellant would agree to do so (R-194).

On cross-examination he stated that it was not an unusual practice in the Bank to hold such checks in deferred items for considerable lengths of time and that early in July a check for $4,825 was handled similarly on his own initiative by the assistant manager in Vannatta's absence (R-200-203). He further stated that on some occasions the Appellant would call him to advise him he had written a check or even to get his approval before writing one (R 204); and that he had conversations with Mr. Chun of Dean Witter & Co. relative to Appellant's credit and whether he would honor checks being written by the Appellant for the purchase of stock and also relative to deposits forthcoming from Dean Witter to the account from the sales of stock to cover outstanding overdrafts (R 205-207). This was essentially verified by Mr. Chun although he was quite evasive about it (R 259-264).

Mr. Chun also testified that the Appellant told him it was necessary to settle his account with the bank at

the end of each month (R 266-7, 271-273).

Mr. Vannatta further testified that his reason for approving the Appellant's checks written when there were insufficient funds in the account was a matter of good public relations and that he considered the Appellant a good customer and wanted to accomodate him; and further that he at no time advised the Appellant that it was necessary for him (Vannatta) to indulge in irregular banking procedures in order to accomplish this (R 228).

> "THE COURT: All right. Now, from your various conversations with Mr. Benchwick and Mr. Chun, from the records, it was quite apparent on the face of it that Benchwick was trading in stocks with the moneys derived from these checks --
> "THE WITNESS: Yes.
> "THE COURT: -- at Dean Witter, right?
> "THE WITNESS: Yes
> "THE COURT: In other words, that he was using the money and credit of the bank for his stock trading operation without any interest or other compensation coming to the bank for it. It is obvious on the face of it?
> "THE WITNESS: Yes.
> "THE COURT: You must have known it. It couldn't possibly have been otherwise, could it?
> "THE WITNESS: No, it couldn't.
> "THE COURT: Did you ever discuss that with Benchwick?
> "THE WITNESS: No.
> "THE COURT: Did you ever mention to him the fact that he was using the bank's money to trade in stocks?
> "THE WITNESS: No, I never did.
> "THE COURT: You never mentioned it to him at all?
> "THE WITNESS: No.
> "THE COURT: Did he ever mention it to you?
> "THE WITNESS: No.
> "THE COURT: Did you ever tell him that you were going to terminate this practice, that is, up until the very time that these last checks were involved?

"THE WITNESS: No, I never did.

"THE COURT: You never told him that you were going to terminate it and refuse to honor further checks?

"THE WITNESS: No.

"THE COURT: You must apparently have intended to do this indefintely, then, right?

"THE WITNESS: I don't know.

"THE COURT: I beg your pardon?

"THE WITNESS: I don't know.

"THE COURT: Well, in any case, you never evidenced any intention to stop it?

"THE WITNESS: I never told him that.

"THE COURT: Never told him. All right. Now, did you ever report this matter to the bank superiors that this kind of thing was going on?

"THE WITNESS: No.

"THE COURT: What possible advantage or benefit to the bank can you conceive could come from such a course of conduct over a period of months in this way?

"THE WITNESS: There couldn't be any.

"THE COURT: What?

"THE WITNESS: There couldn't be any.

"THE COURT: On the other hand, it was apparent that the bank was suffering loss and injury continually by these transactions?

"THE WITNESS: Yes.

"THE COURT: That is right on the face of it, isn't it?

"THE WITNESS: On the face of it.

"THE COURT: If there is any other explanation, God knows, I want to hear it. You say Benchwick never mentioned anything about the fact that he had this arrangement for using the bank's money?

"THE WITNESS: No, he didn't sir.

"THE COURT: That is all I have."

(R 238-241)

Also attorney Myer Symonds related an interview with the Appellant on December 24, 1959 during which the latter told him he had written two checks totalling approximately $76,000 (apparently the checks of December 7 and 17 the subject of Counts XII and XIII) for the purchase of stock and for which he did not have sufficient funds in the bank

because the stock had gone down. He further stated to Mr. Symonds that these checks were written pursuant to an arrangement he had with the Bank and that the Bank was well aware of it, that he had been doing it for some time and there was nothing wrong with it because the Bank knew what he was doing (R 281-284). Appellant verified this (R-321) and further stated that he related the same story to his wife's attorney who also disbelieved him (R-322).

Appellant testified that he relied on Mr. Vannatta as manager of the Bank in all fiscal matters and the handling of his accounts at the Bank and that it never occurred to him Mr. Vannatta was doing anything wrong (R 300-302); further that he had no prior experience of this nature in dealing with bank accounts (R-305); that Mr. Vannatta approved his writing these checks (R-304), instructing him to cover them by the end of the month which was done by ascertaining the amount outstanding from Vannatta and selling sufficient stocks to cover it (R-306, 7).

Contrast this with the facts set forth in the Logsdon case, supra; 253 F.2d 12:

> "The Bank of Whitesville was closed by Kentucky and Federal Deposit Insurance Corporation bank examiners on September 16, 1954. Their examination disclosed that Barrett had misapplied funds and credits of the bank by means of withdrawing and hiding ledger sheets, juggling accounts, overstating cash on deposits with correspondent banks, and by withdrawing

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

> and hiding checks drawn on the Bank of Whitesville so that such checks, although honored by the Bank, were not charged against the accounts of the various depositors." 253 F.2d 13
>
> * * * * *
>
> "A review of the evidence shows more than the usual type of overdraft. During a period of 4½ years appellant and his wife issued checks aggregating $149,415.14 on his personal account at the bank in which there were total deposits of only $74,710.20, leaving an overdraft of $74,704.94, represented by 565 checks which were hidden away by the cashier. Their joint income tax return for 1953 showed income of $8,271.28. Checks written on this account and paid by the bank in 1953 totaled $13,941.93. The account of the Alabama-Kentucky Building Supply Company was overdrawn in the amount of $159,613.13 over a period of a year and seven months, represented by 557 checks which were hidden away by the cashier. The income tax return of the Company for 1953 showed gross receipts of $117,414.09. The Company issued checks for that year in the total sum of $211,888.20, which were paid. The cashier testified not only that he notified appellant numerous times that he was overdrawn and that appellant would say that he had some money coming in from the sale of property and would cover the overdraft, but also that appellant knew that when his checks arrived at the bank he, the cashier, would honor them and pay for them out of the bank's funds. It was not shown that he received anything of value from the appellant for handling his checks in such manner. It presents a most unusual and somewhat amazing situation.
>
> "Appellant's defense was his lack of education, the fact that his personal account and the account of the Company were mixed together, the fact that he did not keep check book stubs and only checked the checks returned by the bank to make sure that the checks bore proper signatures, a very inadequate system of bookkeeping, his belief that he always had enough money in the bank to cover the checks, and a denial that the cashier ever told him he was holding checks which he had paid without charging them to his account." 253 F.2d 15

In that case there was evidence that the depositor knew the cashier was hiding checks away and that they were never

charged to his account or covered by deposits. Even so, as pointed out above the majority opinion stated "The most troublesome issue is raised by appellant's contention that the evidence was insufficient." 253 F.2d 14. However the court went on to sustain the conviction by finding the requisite criminal intent through the appellant's reckless disregard of the interests of the bank.

But this conclusion is questionable in view of the concession that there must be some showing of collaboration between the aider and the principle _in the unlawful act_. As stated by Judge Stewart in his dissent, (endorsed by this Court in _Robinson_, _supra_, 262 F.2d 645, 651):

> "It is not enough that the appellant may have wilfully created the occasion or the opportunity for the cashier's misapplication of the funds, even though the appellant may have foreseen the consequences of his own misconduct [cit.]". 253 F.2d 16

There is not only no evidence in _this_ record of Appellant's knowing collaboration with Vannatta in the unlawful act, i.e. indulging in improper banking practices with intent to defraud the bank, but the _only_ evidence on the subject positively establishes that the Appellant _had no knowledge_ that Vannatta was actually doing anything irregular. If Appellant collaborated, then so did Dean Witter & Co., Mr. Chun, the Bank employees under Mr. Vannatta and at the Main Office, and the telephone company, etc. _Robinson_ v. _U.S._, supra, 262 F.2d p. 649.

The Court below apparently presumed from the fantastic nature of the story presented that the Appellant was guilty; accepting the testimony of Vannatta and the Appellant in order to supply some element of collaboration (R-389) yet rejecting it in concluding the element of criminal intent. (R-387, 388. Compare this with the instruction which was criticized in Judge Stewart's dissent in Logsdon set forth above on pp 13 and 14).

Apparently the Judge overlooked the fact that this is a crime involving specific intent as demonstrated by the dissent in Logsdon, which cannot be supplied alone through the "reckless disregard" concept.

> "It is settled by the decisions of the courts that the misapplication condemned by the statute is something more than an irregular or improper use of the bank's funds." Johnson v. United States, 4 Cir. 1958, 95 F.2d 813, 816.

As set forth in the Request for Special Findings (R 24-25) there must be a specific finding not only that Appellant, in writing these checks, intended to defraud the Bank but also that he knew Vannatta was mishandling or concealing the checks contrary to bank regulations or making false entries in order to misapply the bank's money for Appellant's use with intent to injure or defraud the bank.

The oral decision of the Court below (R-384-389) does not sustain its final conclusion:

> "I answer the request for specific findings of fact in each instance in the affirmative. In my judgment the evidence shows beyond a reasonable doubt that each and all of the questions must be answered in the affirmative." (R-389,-90)

SPECIFICATION OF ERROR NO. 3

THE DISTRICT COURT ERRED IN CONSIDERING EVIDENCE OF EVENTS SUBSEQUENT TO THE PERIOD OF THE OFFENSES ALLEGED IN THE INFORMATION IN DETERMINING THE APPELLANT'S GUILT.

Ordinarily in a case tried to the Court without a jury the rules of admissibility of evidence on the ground of relevance are somewhat relaxed inasmuch as it is generally assumed that the Judge will consider only the relevant evidence in making his findings. A reading of the record here will show that much of the evidence was thus admitted without a prior showing of relevance.

Nevertheless the facts of this case present a most unusual situation, both as to events occurring after the period of the indictment as well as before. It is Appellant's contention that his same fears of the outcome of a jury trial were realized even in the absence of a jury, that is, that these subsequent events caused the trier of fact to find Appellant guilty without regard to the inadequacy of the proof required to sustain the offenses with which the Appellant was charged.

To summarize the facts briefly, the Appellant, after establishing a "line of credit" with the Bank through its

manager Mr. Vannatta during the year 1959 in order to trade on the stock market, suddenly became irrational in his method of trading to the point where he thought he had lost so much that there was insufficient in his stock account to cover his outstanding obligations. As a result of this he did many other irrational things after the period of the Information, the most flagrant of which was to cash in all of his stocks in an attempt to recoup his losses on the gambling tables of Las Vegas. Being unsuccessful at this as well, he was then hopelessly unable to cover his outstanding checks with the Bank, and thus the Bank lost over $82,000.

The Court overruled objections to the admissibility of prosecution's Exhibits 3, 4 and 5 being checks made payable to Appellant by Dean Witter & Co. subsequent to the period of the Information (R-133) and to the testimony of Mr. Kawamura relative to the disposition of Exhibit 3 (R-135), and later allowed a running objection to any evidence relative to events occurring subsequent to the period of the Information (R-197).

> "What defendant did with said funds is immaterial. The alleged offense [if at all] was completed when the abstractions occurred." U.S. v. Ruse, D.C. Pa. 1933, 112 F. Supp. 667, 668

> ". . . if the criminal act is not committed at the time, we cannot take a subsequent act and retroject it to the time [of the alleged offense] and charge it as criminal. . . . we cannot base

> criminality solely upon something that was done after the [date of the alleged offense], unless it is of a character to show conclusively the existence of the criminal purpose at the earlier date." U.S. v. Cole, D.C.S.D. Cal. 1950, 90 F. Supp. 147, 154.

It is difficult to venture what part such evidence played in influencing the Judge's decision. However, some clue can be gotten from the pressing questions asked of the Appellant by the Judge (R 379-382):

> "THE COURT: Mr. Benchwick, at the time you left the islands here to return to the mainland you had three checks outstanding to the Bank of Hawaii, $5600 and 70,400 and 6,850; of course, you knew you had those checks outstanding?
> "THE WITNESS: I wouldn't know about the checks outstanding, but I had a rough figure of the total.
> "THE COURT: Yes. Well, I mean you knew you had checks in a very sizeable amount outstanding?
> "THE WITNESS: Yes, your Honor.
> "THE COURT: You talked about it to Vannatta, you said.
> "THE WITNESS: Yes, your Honor.
> "THE COURT: All right. And the total of those checks totals up, if my arithmetic is correct, to some 82,000 several hundred dollars odd.
> "THE WITNESS: Yes.
> "THE COURT: 70,000, 6,000, 5,000 odd; right?
> "THE WITNESS: Yes, your Honor.
> "THE COURT: Of course, when you left the islands, then, you knew that you owed the bank 82,000 odd dollars?
> "THE WITNESS: Your Honor, I was so confused --
> "THE COURT: Well, regardless of that, the fact remains, you knew.
> "THE WITNESS: I knew I owed them an awful lot of money.
> "THE COURT: All right. 82,000 odd it figures up. Now, when you had those stocks cashed you netted an amount more than sufficient to pay the bank what you owed them, didn't you?
> "THE WITNESS: At that time, your Honor, I did not know. At that time I just --

"THE COURT: Can't you answer that question? Here are two checks that I have in my hand, exhibits, one of them is 55,341 and the other is 28,422, and if you add those together it comes to 83,700 odd dollars, roughly about $1,000 more than you needed to pay the bank what you owed them; right?

"THE WITNESS: According to your statement, yes, your Honor.

"THE COURT: Instead of doing that, you took off up to Las Vegas in the manner you have described.

"THE WITNESS: Your Honor, I thought I was about $18,000 in the hole. That's why I went to see the attorneys. And I -- by poor calculation, and as I said, I could see now what has been done, and even as my attorney has mentioned to me, that you had the money, yet, I can honestly state I didn't think I had a sufficient amount of money, but even so, when I left for the mainland I did not have any --

"THE COURT: Well, stop a moment on that. You know, of course, that Vannatta -- you were talking to Vannatta on the phone, he was writing to you about the matter; why didn't you ask him how much you owed?

"THE WITNESS: He never wrote me, your Honor, about the matter.

"THE COURT: Well, did you ever ask him how much money you owed the bank. Did you take any interest in it, what you owed them, when you left here with all your property and your family and whatnot?

"THE WITNESS: Yes, I did.

"THE COURT: And what did they tell you that you owed them?

"THE WITNESS: The last account I could recall, your Honor, was in November, and I had started to straighten --

"THE COURT: I am talking about the time that you left here to go back to the mainland, sold your property and one thing and another, did you ever find out from the bank or ask Mr. Vannatta how much you owed and what it took to clear you?

"THE WITNESS: Your Honor, I had intentions of coming back.

"THE COURT: The question is, did you ask anybody so that you would know where you stood with respect to this matter at the time you left?

"THE WITNESS: No, your Honor.

"THE COURT: You didn't do that?

"THE WITNESS: No.

"THE COURT: Did you ask about it at the time you had these stocks sold, producing this large sum, 80 odd thousand dollars?

> "THE WITNESS: No, your Honor, I didn't. As I have testified previously, I never thought I had that much money in stocks.
>
> "THE COURT: But it is apparent now on the face of it that you had more than enough to pay the bank everything you owed them, isn't it.
>
> "THE WITNESS: I can see that, your Honor, yes.
>
> "THE COURT: That is all. Step down. Call another witness."

Also in the comment made by the Judge to the Appellant at the time of setting bail after conviction:

> "You should have been thinking of your family when you took off with all this money. . . ." (R-393)

Actually this Specification of Error is set forth primarily for the purpose of suggesting a reason why the Trial Judge found the Appellant guilty in spite of the lack of competent evidence as set forth in Specification of Error No. 2 above.

CONCLUSION

It is respectfully submitted that the evidence may have been sufficient to find that the Appellant committed some offense such as fraudulent drawing (a misdemeanor) under § 286-1, Revised Laws of Hawaii 1955. And the inadmissible and prejudicial evidence of subsequent events might even support a charge of gross cheat under § 289-1, Revised Laws of Hawaii 1955. Certainly the Appellant was morally wrong in breaking faith with the Bank when he failed to cover the last 3 checks. But these are no reasons to

> [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

convict him under 18 U.S.C. §§ 2 and 656, without legal and competent evidence that he committed *those* offenses.

It is apparent that the Government presented all the evidence available to it and therefore "the defects in the evidence" could not be supplied upon a retrial. *Bryan v. U.S.*, (1950) 338 U.S. 557, 559, 94 L. Ed. 340. For this reason the judgment of the District Court should be reversed and the cause remanded with directions to vacate the judgment of sentence herein and enter a judgment of acquittal of the Appellant. *Karn v. U.S.*, 9 Cir. 1946, 158 F.2d 568, 573. *Klee v. U.S.*, 9 Cir. 1931, 53 F.2d 58, 62. *U. S. v. Gardner*, 7 Cir. 1948, 171 F. 2d 753, 759.

Dated: Honolulu, Hawaii, June 29, 1961.

Respectfully submitted,

E D Crumpacker

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Attorney for Appellant

Of Counsel
CRUMPACKER & STERRY

APPENDIX

Cr. No. 11,546 U.S. v. Stephen R. Benchwick

PLAINTIFF'S EXHIBITS	IDENTIFIED	OFFERED	RECEIVED
#1-A to 1-S	68	159	159
#2-A to 2-MM	69	159	159
#3	21	185	185-187
#4	21	185	185-187
#5	21	185	185-187
#6	74	159	159
#7	74	159	159
#8	74	159	159
#9	177	178	178
#10	236	236	243
#11	242	242	243
#12	242	242	243
DEFENDANT'S EXHIBITS			
"A"	254	254	255
"B-1 to "B-18"	257	257	257
"C-1" & "C-2"	86	284	284
"D-1" & "D-2"	86	284	284
"E-1" to "E-7"	86	284	284
"F-1" to "F-3"	86	284	284
"G-1" & "G-2"	86	284	284
"H-1" to "H-6"	86	284	284
"I-1" to "I-5"	86	284	284
"J-1" to "J-5"	86	284	284
"K-1" to "K-5"	86	284	284

DEFENDANT'S EXHIBITS (continued)

	IDENTIFIED	OFFERED	RECEIVED
"L-1" to "L-5"	86	284	284
"M-1" to "M-7"	86	284	284
"N-1" to "N-6"	86	284	284
"O"	134	137	137
"P"	149 - 151	151	152
"Q"	149 - 151	151	152
"R"	156, 157	157	157
"S"	247	248	248
"T"	285	382	382